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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 **v.**

No. A-1-CA-34514

5 **JOE BLACK,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

8 **Mark T. Sanchez , District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Will O'Connell, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **GARCIA, Judge.**

18 {1} Defendant Joe Black appeals the judgment and sentence entered following his

19 jury trial convictions for trafficking methamphetamine (possession with intent to

1 distribute) and possession of cocaine. [DS 2; RP 160-61, 174-75] Unpersuaded by
2 Defendant’s docketing statement, we issued a notice of proposed summary
3 disposition, proposing to affirm. Defendant has responded with a memorandum in
4 opposition to our notice. We have considered Defendant’s response and remain
5 unpersuaded. We, therefore, affirm.

6 {2} In his docketing statement, Defendant argued that the district court erred in
7 allowing Agent Wester of the Lea County Drug Task Force to testify as an expert and
8 render an opinion that possession of twenty-eight grams of methamphetamine is
9 consistent with an intent to distribute. [DS 5-6, 8] In support of this argument,
10 Defendant contended that there was no evidence of “strength or purity” of the
11 methamphetamine and “dosage used by a habitual user of methamphetamine varies
12 based on the strength of the material ingested.” [DS 8] Defendant further claimed that
13 there was a lack of foundation to support Agent Wester’s opinion, and therefore, there
14 was a lack of evidence to establish that Defendant possessed methamphetamine with
15 an intent to distribute it. [Id.]

16 {3} In our notice of proposed disposition, we discussed two cases addressing
17 similar challenges. [CN 3-4] *See State v. Rael-Gallegos*, 2013-NMCA-092, ¶¶ 17-37,
18 308 P.3d 1016 (holding that the district court did not err in admitting the testimony
19 of an officer “who testified as an expert in distinguishing between personal use and

1 trafficking amounts in terms of crack cocaine”); *see also State v. Taylor*, No. 33,951,
2 mem. op. ¶¶ 11-15 (N.M. Ct. App. Jan. 11, 2016) (non-precedential) (holding that the
3 district court did not err in qualifying “Agent Wester, deputy commander of the Lea
4 County Drug Task Force, as an expert in illegal narcotics trafficking, specifically with
5 respect to distinguishing conditions that are consistent with personal use from
6 conditions that are consistent with trafficking”). We stated that the relevant inquiry
7 is whether Agent Wester’s “knowledge and experience were sufficient to support a
8 determination that [his] conclusions regarding the distinction between personal use
9 amounts versus trafficking amounts of [methamphetamine] may be trusted.” [CN 4
10 (quoting *Rael-Gallegos*, 2013-NMCA-092, ¶ 21)] *See id.* ¶¶ 18, 20.

11 {4} Based on Agent Wester’s training and experience, as discussed in detail in our
12 notice of proposed disposition, we proposed to conclude that the district court did not
13 abuse its discretion in determining that Agent Wester demonstrated sufficient
14 knowledge and experience to testify as an expert in distinguishing between possession
15 of quantities consistent with personal use and trafficking. [CN 4-5] *See Rael-Gallegos*,
16 2013-NMCA-092, ¶¶ 18-25 (holding that a law enforcement officer with extensive
17 knowledge and experience relative to narcotics offenses was properly qualified to
18 testify as an expert on the distinction between possession of quantities consistent with
19 personal use and possession of quantities consistent with trafficking); *Taylor*, No.

1 33,951, mem. op. ¶¶ 11-15 (same); *see also State v. Bullcoming*, 2010-NMSC-007,
2 ¶ 28, 147 N.M. 487, 226 P.3d 1 (“Whether a witness possesses the necessary expertise
3 or a sufficient foundation has been established to permit a witness to testify as an
4 expert witness is a matter entrusted to the sound discretion of the trial court. Absent
5 an abuse of discretion, a reviewing court will not disturb the trial court’s decision to
6 accept or reject such testimony.” (citations omitted)), *rev’d on other grounds sub nom.*
7 *Bullcoming v. N.M.*, 131 S. Ct. 2705 (2011).

8 {5} In our notice of proposed disposition, we also explained that we were not
9 persuaded that the district court erred in overruling Defendant’s lack of foundation
10 objection to Agent Wester’s testimony that he believed the purity level of
11 methamphetamine sold on the street at that time was approximately 90-95% pure
12 methamphetamine. [CN 6] And, we suggested that the jury was ultimately free to give
13 the officer’s testimony whatever weight it saw fit. [Id.] *See, e.g., Rael-Gallegos*,
14 2013-NMCA-092, ¶ 34 (observing that the jury was “free to accept or to reject”
15 analogous expert testimony); *see State v. Alberico*, 1993-NMSC-047, ¶ 37, 116 N.M.
16 156, 861 P.2d 192 (“The jury is not required to accept expert opinions as
17 conclusive[.]”). Finally, given the evidence that Defendant possessed twenty-eight
18 grams of methamphetamine, we stated that we were not convinced that there was
19 insufficient evidence to establish that Defendant possessed methamphetamine with

1 intent to distribute it. [Id.] *See State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M.
2 691, 974 P.2d 661 (stating that substantial evidence is defined as “such relevant
3 evidence as a reasonable mind might accept as adequate to support a conclusion”
4 (internal quotation marks and citations omitted)). Accordingly, we proposed to affirm.

5 {6} In response, Defendant does not point out errors in fact or law with our notice
6 of proposed disposition. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M.
7 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar cases,
8 the burden is on the party opposing the proposed disposition to clearly point out errors
9 in fact or law.”). Nevertheless, he maintains that the district court erred in allowing
10 Agent Wester to testify as an expert that possession of twenty-eight grams of
11 methamphetamine is consistent with an intent to distribute. [MIO 3] He relies on *State*
12 *v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, to argue that the State’s
13 failure to establish the purity of the methamphetamine made Agent Wester’s opinion
14 unreliable. [Id.] *See id.* ¶ 22 (stating that “where there was no evidence of the
15 concentration of the drug, and no evidence of how long it would normally take a
16 single drug user to consume a given quantity, the weight of the amount recovered
17 could not in itself enable a fact[-]finder to conclude, beyond a reasonable doubt, that
18 defendant intended to distribute the substance”); *see id.* ¶ 24 (holding that “there was
19 insufficient evidence to support a conviction for trafficking, because there was no

1 evidence to support an inference of [the] defendant’s intent to distribute”).

2 {7} *Becerra*, however, is distinguishable. In *Becerra*, we noted the absence of
3 expert testimony regarding whether the 55.53 grams of white powder that tested
4 positive for cocaine was too much for personal use. *Id.* ¶¶ 8, 23. Significantly, we did
5 not believe that “a jury could use ‘common knowledge’ to determine if the amount
6 was too much for personal use[.]” *Id.* ¶ 23.

7 {8} Thus, for the reasons stated in this opinion, as well as those provided in our
8 notice of proposed disposition, we affirm.

9 {9} **IT IS SO ORDERED.**

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11

TIMOTHY L. GARCIA, Judge

12 **WE CONCUR:**

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MICHAEL E. VIGIL, Judge

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STEPHEN G. FRENCH, Judge